[OFFICIAL ENGLISH TRANSLATION]

2000-4081(GST)G

BETWEEN:

LE 11675 SOCIÉTÉ EN COMMANDITE,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on June 25, 2002, at Québec, Québec by
the Honourable Judge Alain Tardif

Appearances

Counsel for the Appellant:	Jacques Larochelle
Counsel for the Respondent:	Michel Morel

JUDGMENT

The appeal from the assessment made under Part IX of the *Excise Tax Act*, for the period from May 26, 1995, to June 30, 1997, notice of which is dated January 15, 1999, and bears the number 8214155, is allowed in that the penalties are set aside and the taxable fair market value of the building located at 11765, 11795, 1ère Avenue Est, Saint-Georges, Beauce, Quebec, is determined to be $2,750,208, with costs to the respondent, the whole in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 6th day of December 2002.

"Alain Tardif"

J.T.C.C.

Translation certified true
on this 26th day of January 2004.

Sophie Debbané, Revisor

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Date: 20021206
Docket: 2000-4081(GST)G

BETWEEN:

LE 11675 SOCIÉTÉ EN COMMANDITE,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Tardif, J.T.C.C.

[1] This is an appeal from an assessment numbered 8214155, made on February 10, 1999, and confirmed on August 9, 2002. The assessment covered the period from May 26, 1995, to June 30, 1997, and dealt with the Goods and Services Tax ("the GST").

[2] The appellant company, a registrant for the purposes of the application of the GST, was required to self-assess on the Fair Market Value ("the FMV") of the building constructed in Saint-Georges, Beauce, Quebec.

[3] The respondent set the FMV of the taxable part of the building at $2,814,269 as at April 1, 1996, whereas the appellant company self-assessed on an amount of $2,479,415. The respondent also added interest and penalties to the assessment.

[4] The subject of the assessment is a part of a six-storey building. The ground floor, with an area of 14,000 square feet, was occupied by a department store; only the floors above the ground floor are involved in the assessment.

[5] The five floors on the basis of which the assessment was made are: the second floor with various administrative areas, common rooms, meeting rooms, a kitchen and a dining room, all designed to meet the needs of the senior citizens who are to occupy the four other floors, each with 17 units, for a total of 68 units.

[6] Initially, the project was to have two phases; some Phase I facilities were developed in order to eventually serve Phase II. On the date of the valuation, Phase II was not completed.

[7] What must essentially be determined is the FMV of the residential part of Phase I and whether the penalties were justified.

[8] The appellant company is a limited partnership that owns a building that was completed around April 1, 1996, when the first tenants began to move in.

[9] The ground floor, occupied by the "Rossy" department store, was determined to have a commercial purpose. The other floors, five in total, had a residential rental purpose as a seniors' residence providing a number of services.

[10] In anticipation of the hearing of its appeal, the appellant company retained the services of an expert to set the FMV. After studying the case, the expert valued the GST-taxable part of the building at $2,178,000.

[11] Having already stated in its Notice of Appeal that the building had a value of $2,479,415, the appellant company made an oral application for leave to file an amended Notice of Appeal reducing the previously stated value of $2,479,415 to $2,178,000. The respondent objected, arguing that a judicial admission was involved that should form part of the case.

[12] In support of its claims, the appellant company argued that what was involved was not a judicial admission but, essentially, an admission of no consequence, the sole purpose of which was to come to an agreement. In its Notice of Appeal, the appellant company stated as follows:

> [TRANSLATION]
>
> Your applicant estimated the market value of Phase I thus defined at $2,479,415.

[13] In the Reply to the Notice of Appeal, the respondent stated as follows, at paragraph 6:

> [TRANSLATION]
>
> It denies the truth of paragraphs 9, 10, 11, 12 and 13 of the Notice of Appeal as written.

[14] The appellant company argued that an admission was not involved and, alternatively, that if an admission were involved, the appellant company should be granted leave to withdraw it on the basis of fairness given that, in its opinion, only an expert was qualified to set the FMV; because the appellant company was not an expert in this field and the expert that was retained subsequently set a much lower FMV, the FMV set at the time of the Notice of Appeal should not be used as an admission.

[15] Taxpayers subject to the tax are required not to hire an expert to set the FMV but to simply pay the tax on the FMV. From the outset, we can assume that the first reaction of taxpayers subject to the tax is to underestimate the FMV, on the basis that they can discuss and even negotiate to ultimately reach a compromise, with the normal and indeed legitimate objective of avoiding paying the substantial fees of a professional appraiser or of avoiding paying tax not payable.

[16] In this case, the situation was quite different. According to the appellant company, it overestimated the FMV, not wanting to spend substantial fees to have a report prepared by an expert; it indicated the stated value essentially to come to an agreement.

[17] I do not believe that what was involved was a simple statement made as part of a discussion in order to come to a settlement or a compromise for the purpose of avoiding the costs of a court case.

[18] What was involved was a statement issued in an important legal proceeding, that is, the Notice of Appeal. There is no doubt that this statement was indeed a judicial admission: acknowledgement of a fact that was likely to produce legal repercussions and effects against the person who makes it.

[19] Is it possible to withdraw such an admission? It is appropriate to reproduce certain relevant legislative provisions:

***Civil code of Québec,* Book Seven, Evidence**

> **2850.** An admission is the acknowledgment of a fact which may produce legal consequences against the person who makes it.
>
> **2852.** An admission made by a party to a dispute or by an authorized mandatary makes proof against him if it is made in the proceeding in which it is invoked. It may not be revoked, unless it is proved to have been made through an error of fact.
>
> The probative force of any other admission is left to the appraisal of the court.

Canada Evidence Act

> **40.** In all proceedings over which Parliament has legislative authority, the laws of evidence in force in the province in which those proceedings are taken, including the laws of proof of service of any warrant, summons, subpoena or other document, subject to this Act and other Acts of Parliament, apply to those proceedings.

Tax Court of Canada Rules (General Procedure)

> **54.** A pleading may be amended by the party filing it, at any time before the close of pleadings, and thereafter either on filing the consent of all other parties, or with leave of the Court, and the Court in granting leave may impose such terms as are just.
>
> **132.** A party may withdraw an admission made in response to a request to admit, a deemed admission or an admission in the party's pleading on consent or with leave of the Court.

Legal rules applicable to withdrawal of judicial admission

The FMV indicated in the initial Notice of Appeal of Phase I constitutes a judicial admission. From the appellant company's point of view, it is an unfavourable admission in that it sets the FMV higher than the FMV subsequently set by the accredited appraiser. Since the amount of tax payable by the appellant company is computed on the basis of this FMV, it is in the appellant company's interest that the FMV be set as low as possible. In indicating $2.4 million in the initial Notice of Appeal, the appellant company made this judicial admission; in filing an amended Notice of Appeal, it now wishes to withdraw that admission.

In considering the judicial admission and the criteria to be applied in determining whether to allow its withdrawal, in accordance with section 40 of the *Canada Evidence Act* (reproduced on page 4) I must rely on Quebec civil law. Here is what the *Civil code of Québec* provides concerning the withdrawal of a judicial admission:

> **2852.** An admission made by a party to a dispute or by an authorized mandatary makes proof against him if it is made in the proceeding in which it is invoked. It may not be revoked, unless it is proved to have been made through an error of fact.

[20] Non-revocability is the rule; revocability is the exception. On this point, Professor Jean-Claude Royer[1] writes as follows:

> [TRANSLATION]
>
> A judicial admission may be made by a litigant or the litigant's counsel within the limits of the counsel's mandate. If it is the result of an error of fact, it may be revoked by means of an oral or written motion for its withdrawal or for the amendment of a written pleading. The person who has made the admission shall claim and prove the error of fact to the Court's satisfaction. In our opinion, in making the motion for withdrawal of the admission or for amendment of a pleading, that person need not establish that the admitted fact is false. That person need only establish that the admission was made in good faith, through an error of fact. The courts more readily allow revocation of an admission made by counsel.

[21] In *Terlesian v. Manoukian*, [1997] Q.J. No. 3768 (Q.L.), Bishop J. of the Quebec Superior Court discusses the revocability of judicial admissions at paragraphs 26 and 30 of his decision. Two relevant passages are quoted:

> [TRANSLATION]
>
> 26. Article 2852 of the *Civil code of Quebec* does not allow the revocation of a judicial admission unless it is proved to have been made through an error of fact. The error of fact must exist at the time of the admission. The onus of proving that error is on the defendant.
>
> ...

[1] J.-C. Royer, *La preuve civile*, 2nd ed., Cowansville, Quebec, Yvon Blais, 1995, at pp. 547-548.

> 31. The Court considers that the evidence has not established the probability that the defendant made the admissions at paragraphs 2 and 7 of his defence through an error of fact. Although the defendant claimed to have expressed his intent erroneously in his October 1994 defence, the fact that he waited 32 months until the hearing on the merits before correcting his "error" suggested, instead, that his actual intention was, and still is, to delay the action.

[22] The general rule governing amendments in general, as opposed to amendments of pleadings in which a judicial admission has been made, was set out by the Federal Court of Appeal in *Canderel Limited v. Canada*, [1993] DTC 5357, at page 5360:

> ... the general rule is that an amendment should be allowed at any stage of an action for the purpose of determining the real questions in controversy between the parties, provided, notably, that the allowance would not result in an injustice to the other party not capable of being compensated by an award of costs and that it would serve the interests of justice.

[23] In *Shaw Communications Inc. v. Canada*, [2001] T.C.J. No. 489 (Q.L.), Mogan J. states, at paragraph 5: "The question is whether it is more consistent with the interests of justice that the withdrawal be permitted or that it be denied." In *Continental Bank Leasing Corporation v. The Queen*, [1993] DTC 298, Bowman J. writes as follows, at page 302:

> ... I prefer to put the matter on a broader basis: whether it is more consonant with the interests of justice that the withdrawal or amendment be permitted or that it be denied. The tests mentioned in cases in other courts are of course helpful but other factors should also be emphasized, including the timeliness of the motion to amend or withdraw, the extent to which the proposed amendments would delay the expeditious trial of the matter, the extent to which a position taken originally by one party has led another party to follow a course of action in the litigation which it would be difficult or impossible to alter and whether the amendments sought will facilitate the court's consideration of the true substance of the dispute on its merits. No single factor predominates nor is its presence or absence necessarily determinative. All must be assigned their proper weight in the context of the particular case. *Ultimately it boils down to a consideration of simple fairness, common sense and the interest that the courts have that justice be done.*
>
> (Emphasis added.)

[24] Lastly, in *Andersen Consulting* v. *Canada*, [1998] 1 F.C. 605, at page 612, the Federal Court opted for a flexible approach:

> We must ensure that the procedure to withdraw admissions is not made so complex and so stringent that virtually no admissions will be made by defendants.

[25] In light of the comments by these authorities, should the appellant company be granted leave to amend the amount of the FMV? In order for someone to be relieved from the consequences of an admission, it must be established that the admission was made through an error. In this regard, the evidence does not show that there was any error.

[26] I answer this question in the negative for the following reasons:

- The appellant company had the knowledge, the experience and, most importantly, all the relevant information to conclude that the FMV was $2,479,415, a figure arrived at with the assistance of its very well-informed accountant.

- Were one or more errors made that could explain the valuation of $2,479,415?

[27] The appellant company adduced no evidence establishing that significant errors were made other than to state that the appellant company was not an expert in this field. The evidence has in fact established that Jean-Jacques Verreault had considerable experience in this field. Neither the accountant Michel Paquet nor Roch Lessard were professional appraisers; they both had appreciable knowledge for the purposes of determining the FMV—one of them was an accountant who had access to all the relevant documents and the other was a construction expert.

[28] As well, this matter involved a new building, a project with which both these persons had been closely associated. These facts did not automatically rule out the possibility of making one or more errors, but what needed to be established was that the valuation of $2,479,415 had been made through one or more errors, and this was not done.

[29] I find that this admission was binding on the appellant company since there was no evidence that it was made through an error. The application for leave to file

an amended Notice of Appeal reducing the previously stated FMV is therefore dismissed.

[30] Concerning the issue of the FMV of the GST-taxable part of the building, an analysis of the two valuations prepared by the experts mandated by the parties should be made.

[31] Although generally accepted trade practices in valuation provide for various methods or approaches in setting the FMV of a building, that is, the parity method, the replacement cost method, and the income method, both experts agreed that the most appropriate method, which should be preferred in the circumstances, was the income method.

[32] Both experts agreed in stating that the FMV should be set using the income method rather than on the basis of the construction cost, the standard cost, the municipal assessment, or even the comparables resulting from the resale of the building in 1999.

[33] The experts therefore preferred the income method. They agreed on the capitalization rate and on a number of important factors.

[34] The expert Jean-Jacques Verreault prepared a valuation report that appeared to be very well researched, well documented and detailed, thus creating a presumption that he had done very high-quality work and had followed generally accepted trade practices.

[35] Mr. Verreault's testimony established that the reality was just the opposite. This point is quite clearly made in the following excerpts, as recorded at pages 132, 133 and 134 of the transcript:

> [TRANSLATION]
>
> Q. Mr. Verreault, if I understand correctly, your bible for valuation in this case, if I may phrase it that way, consisted of the financial statements of 11675?
>
> A. Villa du Jasmin and the limited partnership, yes.
>
> Q. All right. Did you question some expenditure items in those financial statements, particularly to see if they corresponded to market standards?

A. No. I questioned ... I questioned the expenditure items in order to understand them, because it wasn't ... the breakdown of the expenditure items shown on the balance sheet is not the same as in our valuation reports, but I did not question why the items did not correspond or might not have corresponded to market standards.

And, as well, Your Honour, someone who buys a building isn't buying market statistics. Whether it's a hotel, an apartment building, an inn or a seniors' residence, what the potential investor wants to know is, "Show me the income, show me the expenditures; I'll figure out what kind of yield I can get on my investment and I'll make you an offer to purchase."

That's the basic principle of anyone who invests in the economy, in every country; that's the way it works. An investor doesn't work with statistics.

JUDGE TARDIF

Q. Normally, that should show up in the subsequent sales contract.

A. What should?

Q. What you just stated.

A. Yes.

MICHEL MOREL

Q. Do you agree with me, Mr. Verreault, that an investor will not be content with looking at a business's financial statements, particularly in the case of a building that is a seniors' residence? An investor will look at what is going on in the market, too.

A. Yes, of course. A well-informed investor will try to find comparable factors, see how buildings have sold elsewhere, and look at the ratios.

Q. Do you agree with me ...

A. In this case, there is no parity.

...

[36] Concerning the parking spaces, Mr. Verreault answered as follows, as recorded at page 112 of the transcript:

> [TRANSLATION]
>
> Q. Do you agree with me that Rossy does not occupy all the space indicated in dark gray?
>
> A. I don't remember.
>
> Q. You don't remember.
>
> A. No. I visited the building once, when it was on my way. I don't remember.
>
> Q. In your opinion, how many parking spaces are available for the residents?
>
> A. I cannot answer the question; I don't know that either.
>
> Q. You don't know that either.
>
> A. No.
>
> Q. You do ... you agree with me that the parking spaces, the parking area, is a ... is part of the building construction, do you?
>
> A. Yes, yes.

[37] Concerning economic obsolescence, Mr. Verreault answered questions as follows, as recorded at pages 117 and 118 of the transcript:

> [TRANSLATION]
>
> Q. Very well. Concerning economic obsolescence, Mr. Verreault, you use a factor of 20 per cent, am I right?
>
> A. Yes, yes.
>
> Q. And, in your testimony, you tell us that you are justified in using that factor because of external reasons, external factors; you even mentioned a change of government as a reason.

A. Yes.

Q. On the other hand, in your report, you tell us that the reason you use the 20 per cent factor is that the supply was greater than the demand.

A. That too. There are many reasons, but what I explained in particular, Your Honour, is that economic obsolescence is external to us. It is external to the building: it's economic; it has to do with the economy. It can be caused by a great many factors: excessively high unemployment in a region; supply and demand that differ from one region to another. We have just ... we have just ... Everyone reads the papers, and in Quebec we have just experienced 10 years during which, in the residential market, houses were selling roughly at or below the municipal assessments.

Now, for the past nine or 10 months, it's been a frenzy: houses have been selling at 25 and 30 per cent above the municipal assessments; there aren't even any apartments left for tenants. Over a 10-year period, we were subject to external economic factors. Today, a house that sold for $100,000 seven or eight years ago, still in the same location, still of the same quality and still well maintained, sells for $40,000 more, and it's still the same house and the same materials.

Q. O.K.

A. Economic obsolescence is external to us.

Q. Mr. Verreault, do you agree with me that the project, Phase I, is a major project and that in 1996 there were no projects of that quality in Saint-Georges, Beauce?

A. No, there were none.

[38] Concerning the sale of the building and a lease covering the premises directly subject to the valuation, Mr. Verreault answered as follows, as recorded at pages 121, 122 and 123 of the transcript:

[TRANSLATION]

Q. All right. Mr. Verreault, still using your income method, in terms of expenditures and taxes, in computing the tax expenditure, did

you take the leases into account? For example, in allocating the tax expenditures, did you take into account the lease between the appellant company and Villa du Jasmin?

A. I don't understand your question; do you mean the percentage 76 per cent/24 per cent that I use?

Q. Mr. Verreault, under the lease between 11675 and Villa du Jasmin, is the lessor not responsible for only one-sixth of the taxes and the tenant for five-sixths?

A. I don't know.

Q. You are not aware of that.

A. No.

Q. Are you aware that, under that same lease, Villa du Jasmin is responsible for heating?

A. No.

Q. You are not aware of that either?

A. The heating of the commercial part of the building is paid by ...

Q. I shall find a copy of the contract. Take clause 9.

A. *The tenant shall pay the cost of the electricity used for the operation and heating of the premises rented under the terms of this agreement. As well, the tenant alone shall pay for the cost of cleaning maintenance of the rented premises.*

Q. So, responsibility for the heating and electricity expenditure, Mr. Verreault, did you take that into account in your ... in computing the heating and electricity expenditure?

A. Yes. Well, on the balance sheet, the owner pays only the residential heating. In the owner's heating and electricity expenditures, the meters are separate. Rossy has its own meters.

Q. No, I am not talking to you about Rossy, Mr. Verreault; I am talking to you about the lease.

A. What lease?

Q. The lease signed between the appellant company and Villa du Jasmin.

A. Oh, I'm not aware of that lease. I have never seen it in my life.

Q. Very well.

A. That has nothing to do with ...

Q. As well, were you aware that, under that same lease, Villa du Jasmin is responsible for five-sixths of the insurance?

A. No. Personally, I have never seen that lease.

[39] The burden of proof was on the appellant company.

[40] Mr. Verreault, the expert for the appellant company, had the qualifications to prepare and to submit the conclusions resulting from exhaustive research and work. He submitted a valuation report that appeared to be very well documented and well researched; in fact, however, he essentially used the figures indicated on the unaudited balance sheet prepared by Mr. Paquet, the accountant for the appellant company. Mr. Verreault preferred doings things the easy way rather than doing them meticulously.

[41] Even though the valuation was to be prepared specifically as at April 1, 1996, at the time of his analysis, Mr. Verreault compiled the available accounting figures covering a period of two or three years and then averaged those figures. All the figures used had been recorded after the date at which the valuation was to be prepared.

[42] Although a new building was involved, Mr. Verreault used an economic obsolescence factor of 20 per cent.

[43] Mr. Verreault did not take into account the fact that the initial project included two phases with some infrastructures that are common but connected to Phase I, which is the sole subject of the appeal.

[44] Changed substantially sometime later, the whole project had a direct and significant effect on certain accounting figures used to prepare the valuations. In

making a valuation as at a previous date, it was neither wise nor reasonable to limit the exercise to determining average figures.

[45] Valuing a building as at a specific date several years prior to a given period is a difficult exercise, in the course of which it can be tempting to use figures that were neither known nor available then but that have become accessible in the interim and are available at the time of valuation.

[46] Thus it is always easier and simpler to set a value on the basis of accounting figures indicated in financial statements; the exercise then consists in claiming that the figures reflected reality on the day the value was to be crystallized.

[47] Valuing a building as at a specific date in the past implies using hypothetical figures that must be validated by reference to various statistics and standards to ensure that the result obtained is objective.

[48] In this case, the experts agreed that it was judicious to use the income method: in their opinion, the other methods were not appropriate given the circumstances and the location of the building.

[49] In light of that opinion, it then became essential that certain items of both income and expenditure be subjected to an in-depth, detailed analysis, particularly since only one method appeared appropriate for valuing the building at the time.

[50] Limiting oneself to averaging the figures from three years of operations certainly did not respect generally accepted trade practices since subjective factors, which in this case had to be changed following the considerable alteration of the initial project, had a significant effect on the result.

[51] Not only was the work done by the expert for the appellant company questionable but it was also done the easy way, in that the figures used came from the unaudited financial statements compiled by the appellant company's accountant. This harsh assessment of the quality of the work done by the expert for the appellant company is quite apparent from the following excerpts from his testimony, which, in order to make this judgment easier to read, are reproduced once again:

[TRANSLATION]

Q. Do you agree with me that Rossy does not occupy all the space indicated in dark gray?

A. I don't remember.

Q. You don't remember.

A. No. I visited the building once, when it was on my way. I don't remember.

Q. In your opinion, how many parking spaces are available for the residents?

A. I cannot answer the question; I don't know that either.

Q. You don't know that either.

A. No.

Q. You do ... you agree with me that the parking spaces, the parking area, is a ... is part of the building construction, do you?

A. Yes, yes.

...

Q. Very well. Concerning economic obsolescence, Mr. Verreault, you use a factor of 20 per cent, am I right?

A. Yes, yes.

Q. And, in your testimony, you tell us that you are justified in using that factor because of external reasons, external factors; you even mentioned a change of government as a reason.

A. Yes.

Q. On the other hand, in your report, you tell us that the reason you use the 20 per cent factor is that the supply was greater than the demand.

A. That too. There are many reasons, but what I explained in particular, Your Honour, is that economic obsolescence is external to us. It is external to the building: it's economic; it has to do with the economy. It can be caused by a great many factors: excessively high unemployment in a region; supply and demand that differ from one region to another. We have just ... we have just ... Everyone reads the papers, and in Quebec we have just experienced 10 years during which, in the residential market, houses were selling roughly at or below the municipal assessments.

Now, for the past nine or 10 months, it's been a frenzy: houses have been selling at 25 and 30 per cent above the municipal assessments; there aren't even any apartments left for tenants. Over a 10-year period, we were subject to external economic factors. Today, a house that sold for $100,000 seven or eight years ago, still in the same location, still of the same quality and still well maintained, sells for $40,000 more, and it's still the same house and the same materials.

Q. O.K.

A. Economic obsolescence is external to us.

Q. Mr. Verreault, do you agree with me that the project, Phase I, is a major project and that in 1996 there were no projects of that quality in Saint-Georges, Beauce?

A. No, there were none.

Q. There were none. It's a really attractive project, isn’t it?

A. Very attractive.

Q. When was the building sold, Mr. Verreault; do you remember?

A. No idea.

Q. You mention it; you mention it in your report.

A. I do?

Q. Yes. Go to page 32, Mr. Verreault, if you please.

A. Yes.

Q. I imagine you read the contract of sale when you wrote that?

A. Well, in doing a search at the registry office, we saw the index to immoveables, the transaction, but we didn't see the contract, no.

...

Q. Would you go to page 14 of the contract, Mr. Verreault?

CLERK

Exhibit I-6?

MICHEL MOREL: I-6

EXHIBIT I-6

Agreement of sale of the building

MICHEL MOREL

Q. Will you look at clause 14?

A. Yes.

Q. What share is indicated for the commercial part of the building?

A. $1,300,000, plus the commercial land at $30,000.

Q. If we exclude the land, then for the commercial part of the building $1,300,000 is indicated; do you agree with me?

A. Well, that's what I read here.

Q. And do you also agree with me that the commercial part of the building is located only in Phase I of the project?

A. Yes.

Q. You agree with me? Elsewhere, on page 52 of your report, you yourself value the commercial part of the building at $665,000.

A. Yes. Using the economic method?

Q. Page 52.

A. Yes.

Q. How do you reconcile the two amounts, Mr. Verreault?

A. I have no idea. What I estimated was the market value.

Q. All right. Mr. Verreault, still using your income method, concerning expenditures and taxes, in computing the tax expenditure, did you take the leases into account? For example, in allocating tax expenditures, did you take into account the lease between the appellant company and Villa du Jasmin?

A. I don't understand your question; do you mean the percentage 76 per cent/24 per cent that I use?

Q. Mr. Verreault, under the lease between 11675 and Villa du Jasmin, is the lessor not responsible for only one-sixth of the taxes and the tenant for five-sixths?

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JUDGE TARDIF

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A. What should?

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A. Yes, of course. A well-informed investor will try to find comparable factors, see how buildings have sold elsewhere, and look at the ratios.

Q. Do you agree with me ...

A. In this case, there is no parity.

...

Q. Do you agree with me, Mr. Verreault, that financial statements, particularly unaudited financial statements, are merely working tools for valuation purposes?

A. Listen, those are financial statements prepared by a chartered accountant. I don't know what you mean or what you want to imply by that, but they were prepared by a chartered accountant who is responsible for his profession, and it's not my job to question his work.

Q. Am I to conclude, then, Mr. Verreault, that your work is limited to averaging figures from financial statements that the accountant has given you, financial statements that are unaudited?

A. In this case, we worked with the financial statements, yes.

[52] It appears from the evidence that Jean-Jacques Verreault did not take the parking spaces into account. He overestimated certain income items. He used an economic obsolescence factor of 20 per cent for a new building; he completely disregarded the lease between limited partnership No. 11675 and Villa du Jasmin, which provided figures that were very helpful for the valuation.

[53] On the other hand, Francyne Bélanger, the expert who has worked for the respondent for a number of years, did flawless work. The high quality of her work was made clear by her testimony. She made a thorough analysis of each item of both income and expenditure.

[54] Even though her status as an employee might adversely affect the quality of her work in terms of the objectivity of her valuation, she overcame this difficulty brilliantly. The expert having used various external figures, it was easy to cast doubt on the accuracy of those figures. However, that did not affect the quality or the credibility of this expert's conclusions.

[55] The excellent cross-examination to which this expert was subjected did not succeed in bringing to light any significant flaw that could discredit the quality of her work, which respected generally accepted trade practices. Quite the contrary— it enabled her to describe in even greater detail the responsible approach she had taken.

[56] Counsel for the appellant company argued that the lease between the appellant company and Villa du Jasmin was inappropriate: the two corporations were not dealing with each other at arm's length, and the content of the lease was therefore neither relevant nor reliable.

[57] That legal reality might have made a conclusion such as that possible but did not make it automatic. What would have needed to be established is that the rights and obligations of the parties to the contract were determined by the fact that they were not dealing with each other at arm's length and, on the balance of evidence, that the content of the contract was significantly different from what it would have been had the contract been entered into between third parties.

[58] I therefore accept the conclusions resulting from the work of Ms. Bélanger, and I find that the before-tax value of the building owned by the appellant company was $2,750,208 as at April 1, 1996.

[59] Since this FMV was lower than the FMV that formed the basis for the assessment being appealed from, I allow the appeal in that the case is to be returned for reassessment on the basis that the value of the GST-taxable part of the building as at April 1, 1996, was $2,750,208.

[60] Where the penalties are concerned, the appellant company established that it acted diligently in self-assessing on the basis of a value that was not completely arbitrary in the circumstances. A variation of 10 per cent on an overall valuation of nearly $3 million certainly does not justify a finding of carelessness, neglect, or any omission; the valuation was made by an accountant whose good faith cannot be called into question.

[61] As well, the experts indicated that this was a special case in which it was relatively difficult to use the traditional methods in setting the taxable value.

[62] The special nature of the case is thus an additional factor in evaluating the appellant company's responsibility; the evidence has shown that the appellant company had acted responsibly and in good faith. Thus, there is no need to maintain the penalties, and I therefore set them aside.

[63] For all these reasons, the appeal is allowed in part, in that the penalties are set aside and the taxable FMV of the building located at 11765, 11795, 1ère Avenue Est, Saint-Georges, Beauce, Quebec, is determined to be $2,750,208, the whole with costs to the respondent.

Signed at Ottawa, Canada, this 6th day of December 2002.

"Alain Tardif"

J.T.C.C.

Translation certified true
on this 26th day of January 2004.

Sophie Debbané, Revisor